APPENDIX

EXHIBIT "A"

(Filed November 20, 1956)

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

NONLES PARNACHER, DEVET PARNACHER, NANNIE PARNACHER, now JOHNSON, and SALINA SCOTT, Plaintiffs in Error,	)	
vs.	)	No. 37026
HOUSTON B. MOUNT, Executor of the Estate of LIESINY WALTON, Deceased, Defendant in Error.	)	

SYLLABUS

Where, in an appeal lodged in probate proceedings involving a testatrix' estate, this court finally and definitely determines a particular issue, said issue is res judicata between the parties to said appeal. All are estopped from again raising it in a second appeal, and cannot escape such estoppel by advancing new arguments.

APPEAL FROM THE DISTRICT COURT OF PONTOTOC COUNTY.
HON. JOHN BOYCE McKEEL, JUDGE.

From a district court judgment affirming a county court decree approving the final account of Houston B. Mount, executor of the estate of Liesiny Walton, full blood Chickasaw Indian, said testatrix' surviving children and a grandchild appeal.

AFFIRMED

[APPENDIX]

Hal Welch, Hugo, and
Turner M. King,
Carloss Wadlington, Ada. For Plaintiffs in Error.

Claude V. Thompson,
C. L. McArthur,
Hobert G. Orton, Ada, For Defendants in Error.

BLACKBIRD, J.:

This is the second appeal in this case. For the first one, see *Parnacher* v. *Mount*, 207 Okla. 275, 248 P.2d 1021. Both appeals concern the will of Liesiny Walton, a full blood Chickasaw Indian, who died a resident of Pontotoc County, Oklahoma, on February 12th, 1949. Said testatrix' will disinherited her children and natural heirs, and, except for small money bequests, left her estate, including her home-instead allotment, to a nonrelated white man, named Houston B. Mount, who was therein also named executor.

The first attempt at obtaining approval of said will by either a county judge or United States Commissioner, as provided by federal law (35 Stat. 312, 315), was unsuccessful when the Honorable Moss Wimbish, County Judge of Pontotoc County, refused to approve it. Thereafter, in September, 1945, the testatrix, with her attorney and the two persons who attested said will's execution, appeared before the County Judge of Garvin County and obtained its approval by him, all as more fully appears from the report in our opinion in *Parnacher* v. *Mount, supra.*

After the testatrix' death, the aforementioned devisee and executor, Mount, filed the will for probate in the County Court of Pontotoc County. When the aforementioned disinherited natural heirs, plaintiffs in error herein, contested it, said court refused to admit the will to probate. Upon Mount's appeal to the District Court, said court reversed the county court; and named him executor of the estate. This latter judgment was affirmed in *Parnacher* v. *Mount, supra.*

Thereafter, when, at the close of the administration proceedings in the County Court, Mount filed his final account and petition for distribution of the estate, in accord with the terms of the testatrix' will, plaintiffs in error, hereinafter referred to as contestants, filed objections thereto on the same ground upon which they had objected to the will's admission to probate, *i.e.*, that it had not been approved by a County Judge, as contemplated by 35 Stat. 312, *supra*. This time, the county court overruled said objections and entered its decree approving Mount's final account and ordering distribution, as he had prayed for. Upon contestant's appeal to the district court, said court affirmed the county court; and the case is again before this court on contestant's present appeal from the latter judgment.

Mount, appearing herein as defendant in error, and hereinafter referred to as proponent, contends that the issue here has already been decided by this court in *Parnacher* v. *Mount, supra;* and is now *res judicata*. The contestants deny this. They advance the theory that under 35 Stat. 312, *supra,* county judges of Oklahoma have "concurrent jurisdiction" to approve or disapprove wills of full blood Indians, and that the first one, who exercises such jurisdiction, does so to the exclusion of all others, thus rendering his decision of approval, or disapproval, final as to a particular will. Contestants say that their present advocacy of it is the first time this particular theory has been advanced, or considered, by any court in any proceeding concerning this estate; and, that therefore this court's opinion in *Parnacher* v. *Mount, supra,* does not render the issue *res judicata* here. They further urge that even if said opinion is determinative of the issue here, it should be overruled.

We find no merit in contestant's argument. By the first paragraph of the syllabus in *Parnacher* v. *Mount, supra,* we held that 35 Stat. 312, does not specify *what* county judge "shall have authority to approve wills of full bloods" and that *any* county judge of Oklahoma may approve such will,

"*regardless* of failure to approve by any other county judge to whom previously submitted" (Emphasis ours). In the body of that opinion, after quoting the portion of the Federal act directly involved, this court (page 1024) said:

> "* * * We think the authority given to County Judge by the Above Act is not such as to render the action of the first one to whom a will is submitted final and binding upon all other County Judges in the state * * *."

In that opinion we referred to another provision of the Act dealing with approval of conveyances of full blood Indian heirs, and, upon noting its designation (for such approval) of the County Court having jurisdiction to administer the decedent's estate, we further said: "Surely such a provision would have been inserted in the above quoted section of the Act if it had been intended to restrict approval * * * to any single or particular County Judge." It will thus be seen that this court there decided adversely to the contestants, the exact issue which they have again raised, and are attempting to re-litigate, in the present proceedings and appeal. In 50 C.J.S., "Judgments", sec. 712c, it is said:

> "If a point or question was in issue and adjudicated in a former suit, a party bound by the judgment cannot escape the estoppel by producing at a second trial new arguments * * * in support of the proposition which was decided adversely to him."

In *Metropolitan Life Ins. Co.* v. *Pribble* (Tex. Civ App.), 130 S.W.2d 332, it was held:

> "A judgment rendered by a court having jurisdiction of the parties and subject matter * * * is conclusive and indisputable evidence concerning all rights, *questions*, or facts put in issue in the suit and actually adjudicated therein when they come again into controversy between the same parties or their privies in proceedings on the same or a different cause of action.

"Where a point or question was in issue and adjudicated in a former suit, a party bound by the judgment cannot escape the estoppel thereof by producing at a second trial new arguments * * * in support of the proposition which was decided adversely to him" (Emphasis ours).

See also American Jurisprudence. Vol. 30, "Judgments", sec. 178, pages 923, 924 and Vol. 3, "Appeal and Error", sec. 985. Of similar import and like effect are the previous decisions of this court. See for instance, *Uncle Sam Oil Co.* v. *Richards*, 73 Okla. 248, 175 P. 749, cited and quoted in *Eaves* v. *Busby* (Okla.), 268 P.2d 904; and *Benson* v. *Fore*, 136 Okla. 185, 276 P. 742, 64 A.L.R. 154.

In view of the foregoing, we must conclude that the opinion in *Parnacher* v. *Mount, supra,* renders the issue present in this appeal *res judicata.*

We have also considered contestant's contention that our opinion in that case should be overruled, but they have made no convincing demonstration that, what we there said and held with reference to said issue, is incorrect or unsound in any respect. We therefore refused to disturb that opinion.

The judgment of the trial court is therefore affirmed.

CORN, DAVIDSON, HALLEY, JACKSON and CARLILE, JJ., Concur.

WILLIAMS, V. C. J., Concurs in result.

JOHNSON, C. J., and WELCH, J., Dissent.

EXHIBIT "B"

FILED
In Supreme Court
of Oklahoma
MAR 25 1952
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Nonles Parnacher et al.,	)	
Plaintiffs in Error,	)	
-vs-	)	No. 34,531
Houston B. Mount,	)	
Defendant in Error.	)	

SYLLABUS

1. Sec. 23 Act of Congress of April 26, 1906, as amended by Act of May 27, 1908 (35 Stat. 312), providing that the will of a fullblood Indian, bequeathing restricted real estate, shall be invalid if it disinherits children, unless acknowledged before and approved by "a Judge of a County Court of the State of Oklahoma", does not specify what County Judge shall have such authority, and any County Judge of Oklahoma may approve such will, regardless of failure to approve by any other County Judge to whom previously submitted.

2. Proceeding to probate a will is in the nature of an equity case, and on appeal this court will examine the entire record and weigh the evidence, but will not disturb the judgment of the trial court unless found to be clearly against the weight of the evidence.

3. Application to disqualify trial judge, where only bias and prejudice are alleged, rests largely within the sound discretion of the court, and refusal to disqualify will not be reserved unless it clearly appears that there was an abuse of discretion.

4. The general rule prohibiting an attorney from testifying as to transactions with a deceased person under circumstances set out in Sub. 4 Sec. 385, 12 O.S. 1951, is not applicable to communications from client to attorney made in the presence of third parties, and attorney may testify as to communications with client in regard to preparation of will, where made in the presence of others.

APPEAL FROM DISTRICT COURT OF PONTOTOC COUNTY

Hon. Hoyt Driskill, Judge

Action by Houston B. Mount to probate will of Liesiny Walton, fullblood Chickasaw Indian, leaving all of her land to Houston B. Mount. Nonles Parnacher, Devet Parnacher, and Nannie Parnacher, now Johnson, children, and Salina Scott, granddaughter of testatrix, protest and appeal from the order of the District Court of Pontotoc County admitting will to probate.

AFFIRMED

Turner M. King,
Carloss Wadlington,
Ada, Oklahoma, for Plaintiffs in Error;

McArthur & Orton,
Claude V. Thompson,
Ada, Oklahoma, for Defendant in Error.

HALLEY, V. C. J.:

Liesiny Walton was a fullblood Chickasaw Indian. She died February 12, 1949, at about 78 years of age, while residing upon her homestead allotment in Pontotoc County, Oklahoma, where she had lived for many years. She left a will whereby she bequeathed to her three living children, Nonles Parnacher, Devet Parnacher, Nannie Parnacher (now Johnson), and a granddaughter, Salina Scott, the sum of five dollars each. The remainder of her estate, in-

cluding her homestead allotment, she gave to Houston B. Mount, a white man not related to her. She appeared before the County Judge of Pontotoc County with the attorney who had prepared her will and with her attesting witnesses and offered to acknowledge her will before him, and requested his approval thereof. The will was dated August 28, 1945, and named Houston B. Mount as executor without bond. The County Judge of Pontotoc County refused to approve the will upon the ground that he did not consider it such a will as warranted approval.

Earlier in 1945, testatrix had appeared before the United States Probate Attorney and asked him to prepare her will, giving her land to Houston B. Mount, but he told her that he did not draw wills for fullblood Indians giving their property to white people. She could not speak or understand the English language and spoke through an interpreter. In September, 1945, her attorney, who had prepared the will, together with the testatrix and her two attesting witnesses, went to Pauls Valley in Garvin County and sought approval of the will by the County Judge of that county, advising him that the County Judge of Pontotoc County had refused to approve it. The will was approved by the County Judge of Garvin County.

After the death of the testatrix, her will was filed for probate in the County Court of Pontotoc County by Houston B. Mount, the principal beneficiary and named executor. The above named heirs of the testatrix contested the will. After hearing, the court denied probate, and Houston B. Mount appealed to the District Court of Pontotoc County, which admitted the will to probate and named Houston B. Mount as executor. It is from that order that the children and granddaughter of the testatrix have appealed to this court.

Contestants submit five propositions in support of their contention that the will is invalid and should not have been admitted to probate. We shall first consider the contention that the will is void as to restricted property under

Sec. 23 of the Act of April 26, 1906 (34 Stat. 137) as amended by Sec. 8 of the Act of May 27, 1908 (35 Stat. 312), which provides:

> "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal and all interest therein: Provided, that no will of a fullblood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such fullblood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States Commissioner, or a judge of a county court of the State of Oklahoma."

It will be noted that the Act provides for acknowledgment before and approval by "a judge of a county court of the State fo Oklahoma." It contains no specific provision as to venue. There is nothing to prohibit any County Judge in Oklahoma from approving such a will. The act of approving or disapproving a will is a ministerial act, and the County Judges are officers of the United States when performing such function. The purpose of the Act obviously was to protect fullblood Indians from being imposed upon by unscrupulous persons of more experience in matters involving property. We think the authority given to County Judges by the above Act is not such as to render the action of the first one to whom a will is submitted final and binding upon all other County Judges in the state. We believe that our view is supported by the same Act of Congress, wherein it is provided that conveyances by fullblood Indian heirs must be approved by the Judge of the County Court having jurisdiction to administer the estate of the deceased from whom the fullblood heirs inherited the land. Surely such a provision would have been inserted in the above quoted section of the Act if it had been intended to restrict approval of a fullblood's will to any single or particular County Judge.

[APPENDIX]

The will before us appears to have been properly executed, attested, and acknowledged before, and approved by, a County Judge of Oklahoma. In *Armstrong et al.* v. *Letty et al.*, 85 Okla. 205, 209 P. 168, it was said in the first syllabus:

> "The approval and acknowledgment of the will of a fullblood Indian, required by Act Cong. April 26, 1906, Sec. 23, as amended by Act Cong. May 27, 1908, Sec. 8, is not an element of the execution and attestation contemplated by the statute of Oklahoma and is not within the purview of the jurisdiction of the county court in admitting a will to probate."

And in the body of that opinion it was said:

> "This court has repeatedly held that the sole question involved, when a will is offered to the county court for probate, is the *factum* of the will. That is, has the will been executed and attested in the manner and form required by the statutes, and was the testator competent to make a will at the time he made it, and was he free from the disabilities which operate under our statute to defeat the will?"

The above Acts further provide that any United States Judge or Commissioner in Oklahoma may approve such wills, and nowhere indicate that such action must be taken by any particular United States Judge or Commissioner.

Contestants complain that Luster Cook, Probate Attorney, was permitted to testify that Liesiny Walton came to him and asked him to write her will, making Hounston B. Mount the beneficiary; that she said he had been "nice" to her; that an interpreter and perhaps others were with her and heard her statements relative to the terms of the will. This was some months before she finally made a will.

In *Wright* v. *Quinn*, 201 Okla. 565, 207 P.2d 912, this court announced in the first syllabus:

"Title 12 O.S. 1941, Sec. 385, provides that an attorney shall be incompetent to testify concerning any communications made to him by a client in that relation. The rule, however, does not apply to communications openly made in the presence of third persons. To enjoy the protection of the statute they must have been made in confidence of the relation and under such circumstances as to imply that they should ever remain secret."

The Oklahoma statute on privileged communications between attorney and client, being Sub. 4, Sec. 385, 12 O.S. 1951, was adopted from Kansas; and *In re Wilkins' Estate (Hewitt* v. *Wilkins),* 199 Okla. 249, 185 P.2d 213, followed the Kansas rule that an attorney who prepares a will may testify as to the facts and circumstances in connection with its preparation and execution in order to establish that the will expresses the wishes of the testator and was his free and voluntary act. We find no error in admitting the testimoney of the Probate Attorney, despite the fact that he declined to prepare the will. It is not disputed that the statements of Liesiny Walton to him were made in the presence of others and were not of such confidential nature as to bar their admission in evidence.

If there was error in refusing to compel Houston B. Mount and his attorney, C. L. McArthur, to give their depositions prior to trial, we think it was rendered harmless when both appeared at the hearing and testified. Again, Sec. 276, 20 O.S. 1951, has been held not applicable to probate matters, though tried in the District Court on appeal from the County Court. *Welch* v. *Barnett,* 34 Okla. 166, 125 P. 472.

In contestants' application to have the District Judge disqualified, we find no grounds set out as are contained in Sec. 571, 22 O.S. 1951. Only bias and prejudice are alleged, based upon the friendship of the judge and Houston B. Mount, and upon the fact that the judge was a customer at

Mount's clothing store. It was admitted later that one of the attorneys for contestants was a boyhood friend and schoolmate of the same judge. No facts were proved to establish bias or prejudice. In *Gee et al.* v. *Security Bank & Trust Co. of Enid,* 186 Okla. 477, 98 P.2d 922, this court announced the rule in the second syllabus as follows:

> "An application filed in a civil case to obtain a change of venue or disqualify the judge on the ground of prejudice or bias is addressed to the sound discretion of the judge, and the ruling thereon will not be reversed on apeal, unless there appears to have been a clear abuse of such discretion."

A careful search of the record convinces us that contestants had a fair and imparital trial, and we find no error in the judge's refusal to disqualify.

It is contended that the findings and judgment of the trial court are contrary to the evidence on the issues of testamentary capacity, undue influence, duress and fraud. We find no evidence whatever to support a claim of fraud, duress, or undue influence. There is no evidence to indicate that Houston B. Mount ever tried to influence the testatrix to make him the beneficiary in her will, or that he ever suggested to her that she make a will. No witness testified that Mount ever visited her, though she lived only five miles east of Ada on a paved highway. It is undisputed that he had lent her small sums of money for many years. There is not a word of testimony to indicate that he ever pressed her for repayment of these loans. She died owing him $197.00. There is undisputed testimony that he continued to lend her money up to the time of her death. One of the contestants testified that she knew that Houston B. Mount lent money to the testatrix shortly before she died.

Houston B. Mount had nothing to do with the preparation of the will. C. L. McArthur never represented Mount until after the death of Liesiny Walton. There is one circumstance only that might raise a presumption that Mount

had some part in the preparation of the will: Testatrix was in the office of C. L. McArthur with two Indian friends, who were interpreters and who later signed her will as witnesses. Some months prior to that date, testatrix had asked Richard Colbert, a well-educated Indian friend, if he would prepare some papers for her. He advised her that he had no typewriter. She later told him that she wanted to make a will, and he said he could not prepare it for her, but that he knew a lawyer who could. While they were in the office of the lawyer, C. L. McArthur, they were informed that his fee would be $25.00 for preparing the will. Testatrix evidently had no money, and advised her attorney to call Houston B. Mount. He did call Mount, who advised him that "whatever Liesiny wants to do about it is all right with me—just whatever she wants to do", and that he, Mount, would advance the money to pay the fee. There is no showing as to whether or not Houston B. Mount charged the amount of the attorney's fee, or an additional $25.00 advanced by him for expenses of a trip to Pauls Valley to have the will approved by the County Judge of Garvin County, to Liesiny Walton's account with him.

It was admitted that Houston B. Mount had lent Liesiny Walton small sums of money for years to meet her necessary expenses for food and medical attention. There is nothing in the record to show why or when Liesiny Walton decided that she wanted to make a will. She told one Tom Puller some three or four months before making her will that she wanted to leave her property to Houston B. Mount. The will itself, after devising to Houston B. Mount all the residue of her property except the five dollars each to her children and granddaughter, contains the following statement:

> "* * * he having for many years assisted me financially in furnishing money for groceries, medical expenses, and other necessities, and having befriended me from time to time when I was in need of such assistance."

Richard Colbert testified in regard to the conversation had before the County Judge of Pontotoc County, when he was requested to approve the will, as follows:

Q. "What did she say?

A. She said that her children weren't helping her any financially and that she was unable to care for herself and that she was sick all the time and getting old and feeble and she was there by herself most of the time, and that was her reason for disinheriting the children.

Q. What did she say about what Mount was doing for her, if anything, or was going to do, if anything?

A. She said she was getting help from Mr. Mount; that every time she went to him for money for her needs he always loaned it to her or furnished it or supplied her needs.

Q. Did she say making that will was her way of getting money for her needs?

A. Yes.

Q. Did she say she figured that she would be able to get money when she neded it from then on, for making the will, to get medicine and such as that?

A. I don't think she mentioned any agreement about the future, I don't think she mentioned to me about that."

Judge Goodwin, County Judge of Garvin County, who approved the will, testified as follows:

Q. "Do you remember whether or not she stated why she wanted to leave most of it to Huston Mount?

A. Yes, sir. I asked her why and she said because her children hadn't taken care of her and he had furnished her medical aid and groceries when she didn't have anyone else to furnish them for her and

he had taken care of her on those occasions when no one else would take care of her."

There was considerable argument about the fact that it was nowhere shown that the testatrix was ever advised that she might revoke her will. There is no evidence that during the three and one-half years from the date when the will was executed until her death, she ever expressed any desire to dispose of her property in any manner other than that provided in the will. It is well established that a will which excludes relatives by blood, who would inherit under the law, in favor of unrelated persons, is generally regarded as an "unnatural" will. *In re Estate of Hart (Turner* v. *Porter),* 106 Okla. 180, 233 P. 227, this court quoted from the opinion written by Mr. Justice Kane in *Re Cook's Estate* 71 Okla. 94, 175 P. 507, wherein it was said:

> "* * * The right to make a will includes the right to make it according to the testator's own desires, subject only to the statutory restrictions. Unequal or unnatural provisions in themselves raise no presumption of undue influence. They may be considered with other evidence in determining the question, is this the testator's will? but they do not shift the burden of proof, and, in the absence of proof that undue influence has been exercised, they have no weight * * *."

In the *Hart* case *Supra,* the court further said:

> "It is true that the testator had relatives by blood, among them being the contestant, who no doubt had claims upon his bounty, but courts have no power to control the right of an individual to do with his own as he pleases so long as he possesses testamentary capacity and no undue influence has been exerted upon him."

This court has many times approved what are classed as "unnatural" wills. In *Re Sporn's Estate,* 190 Okla. 149, 121 P.2d 602, the testator, a white man, left a will devising

approximately $50,000.00 to a Negro woman who had been employed by him as a servant and the residue of his estate to trustees for a Negro boy, a nephew of the principal beneficiary. The testator was eighty years of age at the time he executed the will, but it was approved by this court.

The testimony as to testamentary capacity is voluminous. More than forty witnesses testified. Many of those who testified for contestants admitted that they did not believe that any fullblood Indian woman of the age of testatrix, who could not speak, read, or write the English language, could understand a will. Many of these witnesses were clearly prejudiced in favor of contestants, being mostly of Indian blood.

We have carefully considered all of the testimony as to the testamentary capacity of the testatrix, and we are unable to conclude that the findings and judgment of the trial court are clearly against the weight of the evidence. Liesiny Walton was old and feeble during her last years. However, the record shows that the Indian Department approved a deed from her to one of her sons, conveying a part of her land, in 1943. In 1948, she was permitted to lease her homestead for oil and gas. A Mr. McKendree rented her land for grazing purposes, and the Department permitted the lessee to pay the rentals directly to her. This indicates that the Indian Department had confidence in her ability to handle her own affairs.

The testatrix knew her children and granddaughter by name, knew where her land was located, and was able to travel alone by bus at about the time of the making of the will. She told her reasons for excluding her children in favor of one who never had failed to help her, and she doubtless had in mind that the will would insure her against want to the last. Gratitude, a keen sense of obligation for favors already received, and the belief that she would not be left in want in her last days seem to have motivated her in making the will she made. Such conclusion is supported

by her own words and actions. They are logical and honorable, and go far toward establishing her capacity to understand the nature and consequences of her act in making a will.

The testimony in regard to testamentary capacity is too long to repeat in detail; but we have read and considered the facts and circumstances surrounding the execution of the will, and have concluded that the judgment of the trial court is not clearly against the weight of the evidence.

The judgment is affirmed.

Concurr Corn, Gibson, Davison, O'Neal, Bingaman, JJ.

Dissent: Welch, Johnson, JJ.

APR 2 9 19
JOHN T. FEY,

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 396

NOBLES PARNACHER, DEVET PARNACHER, NANNIE PARNACHER, DOW JOHNSON, and SALINA SCOTT,
Petitioners,

VERSUS

HOUSTON B. MOUNT, Executor of the Estate of Lissiny Walton, Deceased,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN BLAINE GILBREATH,
Rollow Building,
Ada, Oklahoma,
Attorney for Respondent.

Of Counsel:

C. L. MCARTHUR,
HOBART G. ORTON,
Cummings Building,
Ada, Oklahoma.

April, 1957.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 5-0760

INDEX

	PAGE
Opinion Below	1
Statement of the Case	2
Summary of Argument	4
Argument	5
Conclusion	16

AUTHORITIES CITED

CASES:

Albright v. Albright (N.M.), 157 Pac. 662	15
Barnett v. Kunkel, 259 Fed. 399	14
Fisher v. Grider, 109 Okla. 23, 234 Pac. 570, Dismissed and rehearing for certiorari denied, 273 U.S. 655, 71 L. Ed. 824, 79 Sup. Ct. 342	14
Hope v. Foley, 57 Okla. 513, 157 Pac. 727, Appeal dismissed, 242 U.S. 666, 61 L. Ed. 552, 37 Sup. Ct. 240	14
Hyde v. Shine, 199 U.S. 62, 50 L. Ed. 90, 25 Sup. Ct. 766	16
Kiker v. United States, 63 F.2d 957	14
Magnum Import Co. v. Coty, 263 U.S. 159, 67 L. Ed. 922, 43 Sup. Ct. 531	10-11
Malone v. Wamsley, 80 Okla. 181, 195 Pac. 484	14
Okla. City v. McMaster, 196 U.S. 529, 25 Sup. Ct. 324, 49 L. Ed. 587	15
Okla. Oil Co. v. Bartlett, 236 Fed. 488	14
Parker v. Richards, 250 U.S. 235, 63 L. Ed. 954	14

INDEX CONTINUED PAGE

Parnacher, et al. v. Mount, 207 Okla. 275, 148 P.2d 1021 ..... 2, 6, 7, 8
Parnacher v. Mount, 306 P.2d 302-305 ..... 1, 6, 8, 16
Parnacher, et al. v. Mount, 207 F.2d 788 ..... 3, 4, 7, 8, 11 15-16
Parnacher v. Mount, 347 U.S. 917, 98 L. Ed. 1073, 74 Sup. Ct. 514 ..... 4, 7, 8
Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 99 L. Ed. 897, 75 Sup. Ct. 614 ..... 9, 10
Snell v. Canard, 95 Okla. 145, 218 Pac. 813, Appeal dismissed, 267 U.S. 578, 69 L. Ed. 791, 45 Sup. Ct. 350 14
Tiger v. Creek County Court, 45 Okla. 701, 146 Pac. 912 14
Wilson v. Wilson (Wash.), 82 Pac. 154 15

STATUTES:

Act of Congress of April 26, 1906, Sec. 23 (34 Stat. 137, 145) 2, 7, 12
Act of Congress of May 27, 1908, Sec. 8 (35 Stat. 312, 315) 2, 7, 12
Act of May 27, 1908, Sec. 9 (35 Stat. 312) 14

TEXTBOOKS AND MISCELLANEOUS:

Address of Mr. Chief Justice Vinson before the American Bar Association, September 7, 1949, 69 Sup. Ct.V VI 9-10
34 C.J. 767 (Judgment, Sec. 1182) 15

In the
Supreme Court of the United States
OCTOBER TERM, 1956

No. 896

NONLES PARNACHER, DEVET PARNACHER, NANNIE PARNACHER, now JOHNSON, and SALINA SCOTT,
Petitioners,

VERSUS

HOUSTON B. MOUNT, Executor of the Estate of Liesiny Walton, Deceased,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Petitioners seek by their petition for writ of certiorari, filed herein, to have reviewed by this Court the decision of the Supreme Court of the State of Oklahoma, Case No. 37026, wherein petitioners were plaintiffs in error and respondent was defendant in error, the said opinion of the Supreme Court of the State of Oklahoma being reported in 306 P.2d 302, and a copy of the opinion, as written by the said Supreme Court of the State of Oklahoma, is included in the appendix to the petition for the writ as Exhibit "A."

We cannot agree with the petitioners that the question which they present for review is open for review in this

proceedings, nor can we agree that Section 23 of the Act of Congress of April 26, 1906 (34 Stat. 137, 145), as amended by Section 8 of the Act of Congress of May 27, 1908 (35 Stat. 312, 315), and the construction thereof by the Supreme Court of the State of Oklahoma in the earlier case of *Parnacher, et al.* v. *Mount*, 207 Okla. 275, 148 P.2d 1021, is open for review in this proceeding. Perhaps the statements of the Oklahoma Supreme Court in that earlier case as to that statute should be referred to as the application of that statute rather than the construction of it as the statute is plain and free from ambiguity.

STATEMENT OF THE CASE

The statement of the case set out in petitioners' petition for writ of certiorari filed herein, pages 6 to 20, is in some respects inaccurate and incomplete, but is perhaps sufficient for the purposes of the consideration of their petition for the writ and our brief in opposition, with two exceptions to which we feel that we should here call attention.

First: At page 11 of the petition for the writ it is insisted that petitioners in their contest in the County Court did not urge that the County Judge of Garvin County did not have jurisdiction to approve the will, and they refer to what is said in that contest in the case-made at page 140. The allegations in said contest (C-M. 143) together with the exception taken by contestants to the Conclusion of Law No. 6 by the District Court in the first trial (C-M. 156), and further coupled with the fact that in all briefs filed in the first case in the Supreme Court of the

State of Oklahoma, they insisted that the will should be held void because of lack of authority of the County Judge of Garvin County to approve the said will, if for no other reason, because the will provided for the appointment of Houston B. Mount as executor without bond, which provision would have the immediate effect of authorizing the executor to take possession of the land when the will was admitted to probate. Referring to this matter in one of the briefs they said:

> "Since this question *has been raised all the way through this case,* so far, this court certainly has jurisdiction to pass upon it, as it at least affects the question as to the validity of that part of the order appealed from directing that Houston B. Mount be appointed executor without bond" (Emphasis supplied).

In view of that and many other similar statements, they certainly cannot now consistently say that they did not urge that point from the very beginning.

Second: At pages 19 and 20 of the petition for the writ filed herein the petitioners contend that the decision of the United States Court of Appeals for the Tenth Circuit in the case of *Parnacher, et al.* v. *Mount,* 207 F.2d 788, was not *res judicata* or an estoppel by judgment as to any issue now before the Court on this appeal, because the decision was not on the merits. That Court, without reservation, affirmed the judgment of the United States District Court for the Eastern District of Oklahoma which is not reported in the printed reporters, but the record contains some verbatim quotations from the judgment of that Court (C-M. 32, 33, 34). As these show, the judgment of the District

Court for the Eastern District of Oklahoma contained the following:

> "It is further ordered, adjudged and decreed by the court that the County Judge of Garvin County, Oklahoma, on the 18th day of September, 1945, had the power, authority and jurisdiction to approve the will of Liesiny Walton, a full blood Chickasaw Indian, that the Honorable Sam J. Goodwin, County Judge of Garvin County, Oklahoma, did on said date properly approve said will in accordance with the provisions of Section 23 of the Act of Congress of April 26, 1906 (34 Stat. 137), as amended by Section 8 of the Act of Congress of May 27, 1908 (35 Stat. 312).
>
> "It is further ordered, adjudged and decreed that plaintiffs take nothing, that the action be and is hereby *dismissed on the merits,* that the defendant have and recover from plaintiffs his costs in the action, and that defendant have execution therefor" (Emphasis supplied).

Certainly the judgment of the United States District Court should be considered in determining what the Court of Appeals affirmed.

SUMMARY OF ARGUMENT

A. The petition for writ of certiorari filed herein does not show any "special or important" reason for granting the writ.

B. The question raised has already been litigated through six separate stages or proceedings in the state courts, three stages or proceedings in the federal courts, including denial of the writ of certiorari by this Court, 347 U.S. 917, 98 L. Ed. 1073, 74 Sup. Ct. 514, and has been

reviewed by appellate courts at least three times, not including the denial of the writ of certiorari by this Court in the former case.

C. The Act of Congress involved is plain and unambiguous and has been construed and applied by the Supreme Court of Oklahoma and the United States District Court for the Eastern District of Oklahoma, whose territorial jurisdiction includes and covers most of the territory where this statute could come into question.

D. The similar and adjoining section (Section 9) of the same 1908 Act of Congress, in regard to approval of deeds of full-blood Indians by the *County Court,* has been conclusively held to be a ministerial act of the federal agency.

E. No record, judgment or even minutes or notation was made in regard to approval or disapproval of the will by Honorable Moss Wimbish, County Judge of Pontotoc County, which could give his refusal to approve the will any official character, much less give it the dignity of *res judicata.*

ARGUMENT

As stated in Rule 19 of this Court, the writ of certiorari "will be granted only where there are special and important reasons therefor." No such reasons are pointed out in the petition filed.

As may be gleaned from the statement of the case in the petition filed herein this matter has been strenuously

litigated through six different successive stages or proceedings in the state courts of Oklahoma:

1. On petition to probate the will of Liesiny Walton in the County Court of Pontotoc County, Oklahoma;

2. On appeal from that proceeding in the District Court of Pontotoc County, Oklahoma;

3. On appeal from that court to the Supreme Court of Oklahoma (Case No. 34531) resulting in the opinion of March 25, 1953, reported in 207 Okla. 275, 248 P.2d 1021, a copy of which is attached to petition for writ herein as "Exhibit B";

4. On final report of executor and petition for distribution under the will in the County Court of Pontotoc County, Oklahoma;

5. On appeal from the decree of distribution of the County Court in the District Court of Pontotoc County, Oklahoma;

6. On appeal from the judgment of the District Court of said county to the Supreme Court of Oklahoma (Case No. 37026) resulting in the opinion of November 20, 1956, reported in 306 P.2d 302, a copy of which is attached to the petition herein as "Exhibit A."

In addition to the litigation in the state courts the parties have gone through three successive, strenuously contested, stages or proceedings in the federal courts:

1. Shortly after the first opinion by the Supreme Court of Oklahoma, above referred to, the petitioners herein filed a suit in the United States District Court for the Eastern District of Oklahoma raising the same question

as to the validity of the approval of the will of decedent by the County Judge of Garvin County, Oklahoma, under the provisions of Section 23 of the Act of Congress of April 26, 1906 (34 Stat. 137), as amended by Section 8 of the Act of May 27, 1908 (35 Stat. 312). That judgment is not reported in the published reports, but reference thereto and quotations from that judgment (C-M. 32, 33, 34) show that judgment to have upheld that approval of the will by the County Judge of Garvin County, Oklahoma.

2. Appeal from that judgment to United States Court of Appeals, Tenth Circuit, resulted in the opinion in *Parnacher, et al.* v. *Mount*, 207 Fed. 788, affirming the judgment of the District Court, and determining that the decision of the Oklahoma Supreme Court, 207 Okla. 275, 248 P.2d 1021, holding the approval of the will by the County Judge of Garvin County, Oklahoma, was conclusive and binding on that court.

3. A petition for a writ of certiorari seeking review of that opinion was filed herein and by this Court denied, March 8, 1954, 347 U.S. 917, 98 L. Ed. 1073, 74 Sup. Ct. 514.

The proceeding in the state courts was stayed and suspended during that litigation in the federal courts, all of which facts are quite fully set out in respondent's final account and petition for distribution (C-M. 3 to 11) and his reply to objections of heirs to distribution, etc. (C-M. 31 to 35). The original orders staying such proceeding and various other orders and proceedings in said probate matter were omitted from the case-made over the objection of this respondent (C-M. 229 to 231) and (C-M. 288).

The petition herein specifically asks to review only the decision of the Supreme Court of Oklahoma in case No. 37026, rendered November 20, 1956, reported in 306 P.2d 302 (Exhibit A to petition) which determined only that the parties were bound by the Court's former decision, reported in 207 Okla. 275, 248 P.2d 1021, and were estopped from again raising the question of the validity of this will by the County Judge of Garvin County after the County Judge of Pontotoc County had refused to approve it.

However, the question presented for review as stated in the petition at pages 4 and 5 is that same question as to the validity of the approval of the will by the County Judge of Garvin County after the County Judge of Pontotoc County had refused to approve it. That is the question which, as stated by the Court of Appeals of the Tenth Circuit, 207 F.2d 788-792, was "expressly considered, determined, and adjudicated" in the first appeal in that case, 207 Okla. 275, 248 P.2d 1021 (Exhibit B to the petition filed herein); and the same question which the Court of Appeals said appellants (petitioners herein) could not litigate anew in that action. Petitioners' application for a writ of certiorari to the Court of Appeals was in that case denied, 347 U.S. 917, 98 L. Ed. 1073, 73 Sup. Ct. 515.

It thus appears that petitioners are now seeking to have the first opinion of the Supreme Court of Oklahoma, 207 Okla. 275, 248 P.2d 1021 (Exhibit B to petition), reviewed, rather than the second opinion, 306 P.2d 302 (Exhibit A to the petition).

Assuming, without conceding, that the correctness of that first opinion of the Oklahoma Supreme Court can

now be reviewed, it nevertheless appears that the petition does not show any "special and important reason" for granting the writ, and no such reason exists.

In the case of *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 99 L. Ed. 897, 75 Sup. Ct. 614, commenting on Rule 19 of this Court as to considerations governing review on certiorari and particularly in regard to the wording of the rule:

> "Where a state court has decided a federal question of substance, not theretofore determined by this court, or has decided in a way probably not in accordance with applicable decisions of this court."

This Court said:

> "A federal question raised by petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants * * *.
>
> " 'Special and important reasons' imply a reach to a problem beyond the academic or episodic."

In this connection, the Court in that opinion called attention to the address of MR. CHIEF JUSTICE VINSON before the American Bar Association, September 7, 1949, 69 Sup. Ct. V VI. In that address the Chief Justice said:

> "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme

national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights & uniformity of Judgments.' The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."

In the same case this Court pointed out that it is very important that the Court:

"be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

In the case of *Magnum Import Co.* v. *Coty*, 263 U.S. 159, 67 L. Ed. 922, 43 Sup. Ct. 531, speaking along the same line, this Court said:

"The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by

this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing."

Petitioners are now asking that they be given another hearing on the same identical question that was heretofore raised in nine separate hearings before six separate courts, including the state and federal courts in which this matter has heretofore been heard.

Petitioners by this proceeding ask that this Court place a strained and impractical construction on a statute that is plain and in no way ambiguous and has already been construed or applied as meaning plainly what it says. There is no conflict between any holdings of the state courts of Oklahoma and any other courts, either state or federal, as to the proper application of this statute. On the contrary, the United States District Court for the Eastern District of Oklahoma in a case between these same parties in regard to the same property involved reached exactly the same conclusion that the state courts reached in regard to the approval of this will by the County Judge of Garvin County, Oklahoma (C-M. 32, 33, 34). That is the case which was appealed to the United States Court of Appeals for the Tenth Circuit resulting in the opinion in *Parnacher* v. *Mount*, 207 Fed. 788, *supra*, which affirms the judgment of the United States District Court, although setting out different and additional reasons for doing so. While the judgment and findings of the United States District Court did not appear in the published reports, quotations therefrom are shown in the records in this case as just above stated, and certainly the conclusions of the United States District Court for the Eastern District of Oklahoma are entitled to

more than ordinary consideration, not only because they are in accord with the holding of the Oklahoma Supreme Court, but for the reason that there is included in that district a very large part of the former Indian Territory where the members of the Five Civilized Tribes of Indians resided at the time this Act of Congress was passed in 1906 and 1908, and where those Indian tribes or their descendants still reside, and that court has had the opportunity and the necessity throughout all the years of the existence of this statute to become familiar with its meaning, intent, and operation. The Act of Congress involved is Section 23 of the Act of Congress of April 26, 1906 (34 Stat. 137, 145), as amended by Section 8 of the Act of Congress of May 27, 1908 (35 Stat. 312, 315), which is as follows:

> "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, that no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner, *or a judge of a county court of the State of Oklahoma*" (Emphasis supplied).

Both the Acts of 1906 and of 1908 applied only to the affairs of the Five Civilized Tribes. This section applies to Indians of those tribes and the proviso thereof applies only to full-blood Indians of those tribes. The said section clearly, plainly and without ambiguity places the will of a full-blood member of said tribe on a par with the will of any other competent person even though they disinherit

members of their family therein enumerated, provided the will is acknowledged before and approved by *"a judge of a county court of the State of Oklahoma."* Indeed, the two Acts of Congress in many ways enlarged the authority of the Indians of these tribes over such of their property as had theretofore been restricted. A trend of Congress has ever since been in the direction of removing, from time to time, more and more of the restrictions on the rights of these Indians to dispose of and manage their own property. It is a statute of very limited application with a limited importance to the public as distinguished from the interests of the parties in this case and a small group, constantly growing smaller, included in the same class. Certainly the petitioners have had the benefit of due process of law. Their case has been carefully considered by courts of competent jurisdiction, not only once, but many times. Their case has received appellate review not only once but at least three times prior to this petition, and in view of the plain and unambiguous wording of the statute, it is difficult to understand how any different construction could be placed on this statute than has been given it by the Federal Court of this District and by the Supreme Court of the State of Oklahoma.

The contention of petitioners that the act of a county judge of Oklahoma approving a will of a full-blood Indian under the provisions of this act is a judicial or quasi judicial act contributes no special or important reason why the writ of certiorari should be granted in this case. Controlling authorities on this question have been amply furnished by construction of the state and federal courts of Section 9

of the Act of May 27, 1908 (35 Stat. 312), which is the next succeeding section of the sections under consideration in this case. Section 9 provides for the approval of deeds of full-blood Indian heirs by the *court* having jurisdiction of the settlement of the estate of said deceased allottee. Such court in Oklahoma is the County Court. Construing this section, both the state and federal courts have held that the County Court mentioned in Section 9 is a federal agency and only performs a ministerial act. *Malone* v. *Wamsley,* 80 Okla. 181, 195 Pac. 484; *Hope* v. *Foley,* 57 Okla. 513, 157 Pac. 727, *Appeal dismissed,* 242 U.S. 666, 61 L. Ed. 552, 37 Sup. Ct. 240; *Tiger* v. *Creek County Court,* 45 Okla. 701, 146 Pac. 912; *Snell* v. *Canard,* 95 Okla. 145, 218 Pac. 813, *Appeal dismissed,* 267 U.S. 578, 69 L. Ed. 791, 45 Sup. Ct. 350; *Fisher* v. *Grider,* 109 Okla. 23, 234 Pac. 570, *Dismissed and rehearing for certiorari denied,* 273 U.S. 655, 71 L. Ed. 824, 79 Sup. Ct. 342; *Okla Oil Co.* v. *Bartlett,* 236 Fed. 488; *Barnett* v. *Kunkel,* 259 Fed. 399; *Parker* v. *Richards,* 250 U.S. 235, 63 L. Ed. 954; *Kiker* v. *United States,* 63 F.2d 957.

Certainly there would be no consistency in holding that the approval of a will by the *county judge* under Section 8 of the above applicable act was a judicial act, and holding that the act of *county court* in approving a deed under Section 9 of the same act is not judicial but ministerial.

Furthermore, even if the approval of the will was construed to be a judicial act, the refusal of Judge Moss Wimbish, County Judge of Pontotoc County, Oklahoma, to approve the will of Liesiny Walton could not be held to be

res judicata or estoppel on any other county judge to approve said will as no application nor any other pleadings or instrument of any kind was filed with Judge Wimbish, no record of any kind was made of his act, and no judgment rendered by him.

> "But the decision or finding of the court do not constitute a bar to the subsequent action unless judgment is entered thereon, and a mere notation on the docket is not sufficient."—34 C. J. 767 (Judgment, Sec. 1182); *Okla. City* v. *McMaster*, 196 U.S. 529, 25 Sup. Ct. 324, 49 L. Ed. 587; *Albright* v. *Albright* (N.M.), 157 Pac. 662; *Wilson* v. *Wilson* (Wash.), 82 Pac. 154.

We do not believe that any discussion as to the timeliness of the holding of the Supreme Court of Oklahoma on the first appeal of *Parnacher* v. *Mount*, 207 Okla. 275, 248 P.2d 1021, would be of any benefit at this time. It may be that in consideration of the first appeal, the Supreme Court of Oklahoma, in view of the insistence and demand of plaintiffs in error (petitioners herein) that the validity of the approval of the will by the County Judge of Garvin County be then determined, and in view of the fact that there was then involved the question of the appointment of the named executor to take immediate possession of the estate, reached the conclusion that an exception or deviation should be made to the rule formerly announced in several cases as to what should be determined in the proceeding to admit the will to probate.

At any rate, that court did then determine that question, and as was stated by the Court of Appeals for the Tenth Circuit, *Parnacher* v. *Mount*, 207 F.2d 788-792:

> "Whatever the rule of law in Oklahoma may thereintofore have been, in *Parnacher* v. *Mount, supra,* the court in a proceeding for the probate of the will of a full-blood Indian of the Five Civilized Tribes expressly considered, determined, and adjudicated that the county judge of Garvin County properly acknowledged and approved the will in accordance with the requirements of the federal statute."

That court expressly conceded that the Supreme Court of Oklahoma had jurisdiction of the subject matter and parties, and such jurisdiction was assumed by the Supreme Court of Oklahoma in both the first and second appeal, and in the second appeal, *Parnacher* v. *Mount,* 306 P.2d 302-305, the Supreme Court of Oklahoma, expressly held that their ruling in the first appeal as to the validity of the approval of the will by the County Judge of Garvin County was *res judicata.* They said in closing:

> "We have also considered contestants' contention that our opinion in that case should be overruled, but they have made no convincing demonstration that, what we there said and held with reference to said issue, is incorrect or unsound in any respect. We therefore refuse to disturb that opinion."

This Court said in the case of *Hyde* v. *Shine,* 199 U.S. 62, 50 L. Ed. 90, 25 Sup. Ct. 766:

> "Certiorari is a discretionary writ, and is often denied where the power to issue it is unquestionable."

It is our contention that there is no special or important reason shown by the petition filed herein and that no

such reason exists for the granting of a writ of certiorari in this case. We, therefore, respectfully pray that the petition for the writ of certiorari be denied.

Respectfully submitted,

JOHN BLAINE GILBREATH,
Rollow Building,
Ada, Oklahoma,

Attorney for Respondent.

Of Counsel:

C. L. MCARTHUR,
HOBERT G. ORTON,
Cummings Building,
Ada, Oklahoma.

April, 1957.